



ANTHONY D. CORTESE, Sc. D.
Commissioner

The Commonwealth of Massachusetts

Executive Office of Environmental Affairs

Department of Environmental Quality Engineering

Division of Wetlands Protection

ONE Winter Street, Boston 02108

Steve

M E M O R A N D U M

TO: Regional Environmental Engineers
Wetland Program Staff
Legal Office

FROM: Roderick Gaskell, Director *RG*

DATE: February 16, 1982

SUBJECT: WETLANDS PROGRAM POLICY 82-1
STANDARDS FOR ASSESSING A REQUEST
FOR A VARIANCE UNDER SECTION 36
OF THE COASTAL WETLANDS REGULATIONS, 310 CMR 10.36.

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Section 36 of the Regulations for Coastal Wetlands, 310 CMR 10.36, provides:

The Commissioner may waive the application of any regulation in Part II when he finds, on the basis of and following an adjudicatory hearing, that such variance will provide the same degree of protection of the interests of the Act as application of these regulations and that the variance is necessary to accommodate an overriding community, regional, state or national public interest.

As required by Section 36, in order to grant a variance the Commissioner must find based on an adjudicatory hearing that: (1) the alternative for which the variance is requested provides protection to the interests of the Act equal to that provided by the applicable coastal regulation; (2) the project serves an overriding community, regional, state or national public interest; and (3) the variance is necessary in order to accommodate the particular public interest served by the project.

On April 7, 1981, the Commissioner issued the first decision under this section in the case of DEQE Wetlands File No. 35-52, Hull (Nantasket Associates - Bay View Towers). In that decision, the Commissioner outlined the three criteria to be evaluated in determining whether to grant a variance and provided guidance on how these criteria

would be applied in future cases. Although no one but the Commissioner is empowered to grant a variance under Section 36, it is important that the Wetlands Staff be aware of the applicable standards since they will have to advise the Commissioner on future variance requests as well as respond to inquiries by applicants, Conservation Commissions, and the general public. Thus, what follows is an explanation of each of the variance criteria which the Department will consider in evaluating a request for a variance.

For the first requirement - the provision of protection equal to that provided by the regulations - the resource area impacted must be identified, along with the interests of the Act protected by that resource area. Then, the applicant for the variance must demonstrate that the alternative applicable means of protection will protect the interests of the Act to the same degree as the coastal regulations, and the alternative must be real, specific, permanent and enforceable.

Whether the second requirement - the service of an overriding public interest - has been satisfied requires a finding that the project be constructed by or under the auspices of a public authority or a private entity found to be serving a public function. In addition, for the project to satisfy the overriding public interest requirement, the public interest project must be one of unusual merit in order to override the applicable coastal regulation.

As for the third requirement - the necessity for the variance - there must be a showing that the nature of the project is such that it cannot be constructed so as to accommodate the overriding public interest unless a variance is granted. In making this showing, consideration should be given to alternative project locations and designs, including divisible segments, size, and site plans. The inquiry into alternatives need not be limited to modifications of the project as originally proposed by the applicant, but shall explore other reasonable options and alternatives which could avoid non-compliance with the applicable coastal regulation, including alternative means of satisfying the overriding public interest unrelated to the original proposal.

As stated in the commentary to Section 36, the variance provision is intended to be employed only in rare and unusual cases, and the applicant requesting the variance has the burden of satisfying each element of the three requirements. Moreover, the mere satisfaction of these minimum requirements does not mandate the granting of a variance, for Section 36 provides that the Commissioner may waive the application of any regulation in Part II. Consequently, the ultimate variance decision is subject to the discretion of the Commissioner, even if the findings required by Section 36 are resolved in favor of the applicant requesting the variance. In exercising his discretion, the Commissioner will consider applicable administrative and executive orders, including the policies embodied in the Massachusetts Coastal Zone Management Program.